MEDLUX OVERSEAS (GUERNSEY) LTD

v.

FABER MEDI-SERVE SDN BHD & ORS

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
DENIS ONG JCA
KC VOHRAH JCA
[CIVIL APPEAL NOS: W-02-345-2001 & W-02-346-2001]
5 JUNE 2001

CIVIL PROCEDURE: *Injunction - Refusal to grant - Whether proper - Balance of convenience - Serious question to be tried - Effect of prior consent order*

CIVIL PROCEDURE: *Injunction - Injunction, application to restrain payment out of company dividend to respondents pending final outcome of suit - Effect of prior consent order - Whether appellant had agreed to respondents receiving their payment pending final outcome of suit - Whether application should be dismissed*

The appellant and the 2nd to 9th respondents ('respondents') were shareholders of the 1st respondent company. The appellant belonged to Class A comprising members of fully paid up shares whilst the respondents were members of Class B who had only paid 5 sen on each of their shares. The appellant disputed two resolutions that were passed and that the Class B shareholders were receiving much more than they ought to receive out of the dividend that was declared, contrary to art. 96 of the Articles of Association of the 1st respondent. The appellant then commenced proceedings by way of petition under s. 181 of the Companies Act 1965. To preserve its position pending the outcome of the hearing of the petition, the appellant applied for and obtained an *ex parte* injunction. Thereafter, a consent order was entered between the parties wherein by para. 5 thereto it was agreed that the respondents would have their payment out of the dividend in question until the final resolution of the petition on its merits. Subsequently, the *ex parte* injunction when it was returned *inter partes* was dissolved by the learned judge. The appellant now appealed.

Held:
Per Gopal Sri Ram JCA

[1] Where there is a breach of a negative covenant, a court in this jurisdiction ought to treat it no differently from any other application for an interlocutory injunction. It must ask itself whether there is a serious question to be tried and go on to determine where the justice of this particular case lies. In assessing where the balance of justice turns, the primary judge is entitled to take into account all relevant circumstances. This, in particular cases, may include the fact that a clear breach of negative covenant has been established, in which case the balance will normally turn in favour of granting an injunction.

[2] A serious question to be tried was disclosed in the present case and the issue was whether the learned judge was wrong in failing to determine where the balance of justice properly lay. At the conclusion of the appellant's arguments, the court was left in no doubt that the learned judge had failed, sufficiently or at all, to address his mind to that question. But however, there was para 5 of the consent order, the effect of which the appellant as the petitioner in the court below gave up its right to have an interlocutory challenge to the payment out of the dividend in question. Whatever rights the appellant had established in relation to the resolution in question from the point of view of an interim injunction, it had plainly agreed that the respondents would have their payments until the final resolution of the petition on its merits.

[3] The court was unable to agree that the consent order was reached without prejudice to the appellant's rights. The function of the court was to interpret the consent order in its plain terms. Whatever, subjective impression that the appellant might have obtained at the material time was irrelevant. The test was objective.

[4] The learned judge was correct in refusing to grant the injunction. The court's reasons might not coincide with his but the court was satisfied with his ultimate decision. A reasonable tribunal armed with the facts of the present case and properly directing itself would exercise its discretion in like manner.

[Appeals dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu dan responden-responden ke-2 hingga ke-9 ('responden-responden') adalah pemegang-pemegang saham syarikat responden pertama. Perayu adalah di dalam Kelas A yang terdiri daripada ahli-ahli bagi saham-saham yang telah dibayar sepenuhnya sementara responden-responden adalah ahli-ahli Kelas B yang telah hanya membayar 5 sen pada setiap satu saham-saham mereka. Perayu telah mempertikaikan dua resolusi yang telah diluluskan dan bahawa pemegang-pemegang saham Kelas B menerima lebih banyak wang daripada yang sepatutnya diterima oleh mereka daripada dividen yang telah diisytiharkan, bertentangan dengan perkara 96 Perkara-Perkara Persatuan responden pertama. Perayu kemudiannya telah memulakan prosiding melalui petisyen di bawah s. 181 Akta Syarikat 1965. Untuk mengekalkan kedudukannya sementara menantikan keputusan perbicaraan petisyen tersebut, perayu telah memohon untuk mendapatkan dan telah memperolehi satu injunksi *ex parte*. Selepas itu, satu perintah persetujuan telah dimasukkan di antara pihak-pihak tersebut di mana melalui perenggan 5 padanya telah dipersetujui bahawa responden-responden akan mendapat pembayaran mereka daripada dividen yang dipersoalkan sehingga resolusi muktamad petisyen tersebut berdasarkan merit-meritnya. Kemudiannya, injunksi *ex parte* tersebut apabila ianya dikembalikan secara *inter partes* telah dibubarkan oleh hakim yang bijaksana. Perayu kini merayu.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Di mana terdapatnya kemungkiran waad negatif, sesebuah mahkamah dalam bidangkuasa ini sepatutnya tidak melayannya secara berlainan daripada sebarang permohonan lain untuk satu injunksi interlokutori. Ianya mestilah menanyakan dirinya samada terdapatnya persoalan yang serius untuk dibicarakan dan terus menentukan di mana duduknya keadilan kes yang tertentu ini. Dalam menaksirkan di mana imbangan keadilan menghala, hakim yang utama berhak untuk mengambilkira kesemua keadaan-keadaan yang relevan. Ini, dalam kes-kes yang khusus, boleh memasukkan fakta bahawa kemungkiran waad negatif yang nyata telah ditentukan, dalam keadaan yang mana imbangan akan selalunya berpaling kepada memberikan satu injunksi.

[2] Suatu persoalan serius yang harus dibicarakan telah didedahkan dalam kes semasa dan isunya adalah samada hakim yang bijaksana tersalah dalam kegagalan menentukan di mana sebenarnya terletak imbangan keadilan. Pada kesimpulan hujahan perayu, mahkamah tidak lagi ragu-ragu bahawa hakim yang bijaksana telah gagal, secukupnya atau apa pun, untuk menumpukan fikirannya kepada persoalan itu. Tetapi bagaimanapun, terdapat perenggan 5 perintah persetujuan tersebut, yang mana kesannya

menyebabkan perayu sebagai pempetisyen dalam mahkamah di bawah melepaskan haknya untuk satu cabaran interlokutori kepada pembayaran daripada dividen yang dipersoalkan. Apa sekalipun hak yang telah ditentukan oleh perayu sehubungan dengan resolusi yang dipersoalkan daripada pandangan satu injunksi interim ianya telah dengan jelas bersetuju bahawa responden-responden akan menerima pembayaran mereka sehingga resolusi muktamad petisyen tersebut berdasarkan merit-meritnya.

[3] Mahkamah tidak dapat bersetuju bahawa perintah persetujuan tersebut telah dicapai tanpa memudaratkan hak perayu. Fungsi mahkamah adalah untuk mentafsirkan perintah persetujuan menurut terma-termanya yang nyata. Apa sekalipun tanggapan subjektif perayu pada waktu yang material itu adalah tidak relevan. Ujian tersebut adalah objektif.

[4] Hakim yang bijaksana betul dalam enggan untuk memberikan injunksi tersebut. Alasan mahkamah ini mungkin tidak sama dengan alasan beliau tetapi mahkamah berpuashati dengan keputusan muktamadnya. Sebuah tribunal wajar yang mempunyai fakta-fakta kes semasa ini dan mengarahkan dirinya dengan sempurna akan melaksanakan budibicaranya dengan cara yang sama.

[Rayuan-rayuan ditolak.]

Case(s) referred to:
Corporation of the City of Toronto v. Toronto Railway Co [1907] AC 315 ***(refd)***
Doherty v. Allman [1878] 3 App Cas 709 ***(refd)***
Hampstead & Suburban Properties Ltd v. Diomedous [1968] 3 All ER 545 ***(refd)***
Smith v. Hughes [1871] LR 6 QB 597 ***(refd)***
Tan Suan Choo v. Majlis Perbandaran Pulau Pinang [1983] 1 MLJ 323 ***(refd)***
Texaco Ltd v. Mulberry Filling Station Ltd [1972] 1 All ER 513 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 181
Specific Relief Act 1950, s. 55

For the appellant - Loh Siew Cheang (Robyn Choi, CW Teo & YB Tan); M/s Khaw & Partners
For the 1st respondent - N Navaratnam (LK Mah); M/s Zul Rafique & Partners
For the 2nd, 4th, 5th, 6th, 7th, 9th respondents - Dhinesh Baskaran (N Segaran); M/s Shearn Delamore & Co
For the 3rd & 8th respondents - David Morais (Khabis Dillon); M/s Kamaruddin Wee & Co

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:

This is an appeal which is directed at the order of the learned judge refusing an injunction sought by the appellant. Although the facts upon which the appellant claimed an injunction is mounted are complex, the elements that formed the nub of the disputes between the parties are fairly simple. I will attempt to summarise these as follows.

The parties before us are all shareholders of a limited company that declared a dividend. There are two classes of shareholders. One class is Class A, comprising fully paid up shares. The appellants before us are members of this class. The 2nd and 9th respondents to the appeal are also Class A shareholders. There is another class. It is called Class B. It is made up of shareholders who have only paid 5 sen on each of their shares.

The essence of the dispute between the parties gravitates on two resolutions passed on 15 May 1999 and 19 November 1999. According to the appellant, these resolutions have the effect of offending art. 96 of the Articles of Association of the 1st respondent, the company in question. Additionally, there is a challenge to the validity of the amendment of the articles of association of the 1st respondent made by a resolution dated 19 November 1999. That resolution introduced an art. 4A, which is also a subject of dispute.

The substance of the complaint made by the appellant is that it is a fully paid shareholder. Dividends having been declared, the Class B shareholders opposing these proceedings are receiving much more than they ought to receive. By reason of this, the appellant is receiving much less than it ought to receive. As I have said, the appellant relied on art. 96 which is in the following terms:

> Subject to any preferential or other special rights for the time being attached to any special class of shares, the profits of the Company which it shall from time to time be determined to distribute by way of dividend shall be applied in payment of dividends upon the shares of the Company in proportion to the amounts paid up or credited as paid up thereon respectively, otherwise than in advance of calls.

Article 4A of the resolution introduced on 19 November 1999 reads as follows:

> The Class B shares, from the date of allotment, shall be entitled to receive payment of any declared dividends to be calculated based on the nominal par value of the Class B shares and not on their paid-up value and this entitlement to dividend shall be deemed to be a preferential right for the purpose of Article 96 of the Articles of Association of the Company.

There is no doubt that the appellant and the respondents are joint venturers. Relying on this fact and upon the challenges made to the declaration of dividend and the amendment to the Articles of Association, the appellant commenced proceedings by way of petition under s. 181 of the Companies Act 1965. In order to preserve its position pending the outcome of the hearing of the petition, the appellant applied for and obtained an *ex parte* injunction on 2 December 1999. The injunction was then returned *inter partes* and the learned judge after considering written submissions put in before him concluded that the injunction ought not to have been granted and dissolved it on 18 April 2001. Prior thereto, on 17 December 1999, a consent order was entered into between the litigants before us. Paragraph 5 of the consent order reads as follows:

> That in respect of payment that may be made by the Company to the 3rd Respondent pursuant to 3 (c) above, such sum paid by the Company to the 3rd Respondent pending the final disposal of the Petition shall forthwith be refunded by the 3rd Respondent to the Company in the event that upon final disposal of the Petition it is found that the 3rd Respondent is not entitled to such payment by this Honourable Court. The refund aforesaid shall forthwith be made within twenty one (21) days from the date of decision of this Honourable Court following final disposal of the Petition to the Company and the Company shall then immediately apply such refund when received to the rightful parties herein who are entitled thereto and in the proportion of their entitlement by way of dividend.

At this juncture, we ought to say a word about how we came to hear this appeal. After the learned judge dissolved the *ex parte* injunction, the appellant moved this court on certificates of urgency for the grant of a fresh injunction pending the hearing of the appeal proper. These applications came before us on 16 May 2001. With the consent of the parties and because of the urgency of the matter, we ordered that the notices of motion be heard as appeals proper and dispensed with the filing of the records of appeal. Pending disposal of the appeal, we ordered the payment of the dividend of Class B shareholders into the joint hands of the Messrs Shearn Delamore and Messrs Cheang & Ariff, both firms of solicitors. For completeness, I would add that a similar order has been made by the learned judge in the court below as part of the consent order dated 17 December 1999.

On a preliminary reading of the records, my learned brothers and I came to the conclusion that this is a case where the pleadings and affidavits clearly disclosed serious questions to be tried. The only outstanding issue for consideration is the correctness of the learned judge's order on the basis as to where the balance of convenience lies.

I may add that nothing that was put to us by counsel in argument has altered our view. But Mr. Loh Siew Cheang for the appellant advanced an additional argument and out of deference to his effort, we are obliged to deal with it.

This is how he summed up the appellant's case upon the first question, namely, whether there was a serious question to be tried. Mr. Loh says that there is not merely a serious question to be tried. He has argued that this is a case in which there is a clear breach of the covenant in art. 96. He therefore says that the respondents really have no answer to this case in so far as the declaration of dividend is concerned. The learned judge therefore should have granted the injunction *ex debito justitae*.

In support of this argument, Mr. Loh relied on two cases. The first is *Doherty v. Allman* [1878] 3 App Cas 709. The second is the decision of Megarry J in *Hampstead & Suburban Properties Ltd v. Diomedous* [1968] 3 All ER 545. The following passage in the judgment of Megarry J was read to us:

> Where there is a plain and uncontested breach of a clear covenant not to do a particular thing, and the covenantor promptly begins to do what he has promised not to do, then in the absence of special circumstances it seems to me that the sooner he is compelled to keep his promise the better. In such a case I do not think that the enforceability of the defendant's obligation falls into two stages, so that between the issue of the writ and the trial the defendant will be enjoined only if that is dictated by the balance of convenience and so on … I see no reason for allowing a covenantor who stands in a clear breach of an express prohibition to have a holiday from the enforcement of his obligation until the trial. It may be that there is no authority on this point; certainly none has been cited. If so, it is high time that there was such authority; and now there is.

I then drew Mr. Loh's attention to a later decision, also of the High Court in England. It is the case of *Texaco Ltd v. Mulberry Filling Station Ltd* [1972] 1 All ER 513. Ungoed-Thomas J dealt with the same point and came to quite the opposite conclusion to that of Megarry J. That is how he put it (at p. 528 of the report):

> Those *obiter* observations were made not with regard to an interlocutory injunction but a perpetual injunction; not on motion but at the trial; and on the footing that there was no dispute as to the validity of the covenant relied on. Lord Cairns LC's reference to 'balance of convenience' is readily associated in our generation with interlocutory injunction; yet in Lord Cairns LC's generation Kekewich J in *Jenkins v. Jackson*, referred to it as comprising considerations relevant to the granting of perpetual injunctions; and even much later Kerr on Injunctions also so referred to it. It seems to me unlikely that Lord Cairns LC directed his mind to interlocutory injunctions at all; but about this there can be no certainty.

> If, of course, as here, the validity of the covenant is in dispute on an interlocutory application, it might well be that the judgment at the trial, after full discovery and evidence, will not be in accord with the interlocutory conclusion on a *prima facie* case and probability of success. And even if validity is not disputed on the motion, it is subject to being issue at the trial; and it does not seem to me that the possibility of its being put in issue (for example, in the light of subsequent information and advice on it) can be justly ignored.
>
> Of course, the required degree of judicial conviction of success at the trial can vary from near certainty to something appreciably less, and the application of the *Doherty v. Allman* rule to applications for interlocutory injunctions would make the injunction automatic on the probability of success at the trial being established, irrespective of the degree of such probability and every matter which, in accordance with the general rule, it is right for the court to take into consideration. The result would be that a probability of success barely established, without the advantage of full evidence and opportunity for full consideration, would result in an injunction in circumstances in which, until trial, the absence of injunction would be no disadvantage of any substance to the applicant and injunction would cause most serious harm to his opponent. It is not difficult to conceive of such a situation.
>
> The plaintiff referred to *Hampstead and Suburban Properties Ltd v. Diomedous.* However, the crucial sentences there have to be read bearing well in mind the careful qualifying words and the significance of the maintenance of the status quo to which I shall come.
>
> So my conclusion is that the principle of *Doherty v. Allman* does not apply to interlocutory injunctions.

Counsel's attention was also drawn to s. 55 of the Specific Relief Act 1950 which is our statutory formulation of the principle in *Doherty v. Allman.* That section reads as follows:

> Notwithstanding section 54(f), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement:
>
> > Provided that the applicant has not failed to perform the contract so far as it is binding on him.

It is important to note that s. 55 comes under that part of the Specific Relief Act which is headed "Perpetual Injunctions".

It is trite law that in the construction of statutory language, regard may and can be had to the headings appearing within the particular statute. That is the approach adopted by so learned a judge as Edgar Joseph Jr. J (as he then was) in *Tan Suan Choo v. Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323. See also *Corporation of the City of Toronto v. Toronto Railway Co* [1907] AC 315.

In our view, therefore, applying the principles to which I adverted a moment ago, s. 55 is confined only to perpetual injunctions. In our judgment, where there is a breach of a negative covenant, a court in this jurisdiction ought to treat it no differently from any other application for an interlocutory injunction. It must ask itself whether there is a serious question to be tried and go on to determine where the justice of this particular case lies. In assessing where the balance of justice turns, the primary judge is entitled to take into account all relevant circumstances. This, in particular cases, may include the fact that a clear breach of negative covenant has been established, in which case the balance will normally turn in favour of granting an injunction. That, we think, is the way in which the decisions in *Doherty, Hampstead* and *Texaco* ought to be applied here. It follows that we decline to accept the "no holiday" argument advanced before us by Mr. Loh.

Having concluded that a serious question to be tried is disclosed in the present case, we turn to consider whether the learned judge was wrong in failing to determine where the balance of justice properly lay. I must confess that at the conclusion of Mr. Loh's argument, my learned brothers and I were left in no doubt that the learned judge had failed, sufficiently or at all, to address his mind to this question. Had matters rested there, we would be quite willing to reverse it. But they do not. There is para. 5 of the consent order to which I have already referred. What is the effect of that paragraph? We think the effect of that paragraph is that the appellant, as the petitioner in the court below gave up its right to have an interlocutory challenge to the payment out of the dividend in question. Here, we must express our gratitude to Mr David Morais, counsel for the 3rd respondent for drawing our attention to the consent order. The upshot is that whatever rights the appellant had established in relation to the resolution in question from the point of view of an interim injunction, it had plainly agreed that the respondents will have their payment until the final resolution of the petition on its merits.

Now, having taken that position on 17 December 1999, it hardly lies in the appellant's mouth to now complain. Mr. Loh argued that his client's position should not be prejudiced by the agreement in question. In other words, the agreement was reached without prejudice to his client's rights. With respect, we are unable to agree because of the language of the consent order. Our function here is to interpret it in its plain terms. Whatever subjective

impression that Mr. Loh or his client may have obtained at the material time is irrelevant. The test is objective: *Smith v. Hughes* [1871] LR 6 QB 597; [1861-73] All ER Rep 632.

For these reasons, we are unanimous in the view that the learned judge was correct in refusing to grant the injunction. Our reasons may not coincide with his but we are satisfied that his ultimate decision is correct. A reasonable tribunal armed with the facts of the present case and properly directing itself would exercise its discretion in like manner.

For the reasons already given, we are of the view that these appeals must fail. The appeals are accordingly dismissed and the usual orders are made that are consequent upon a dismissal.

My learned brothers, Denis Ong Jiew Fook and KC Vohrah JJCA, concur with this judgment.